

WIND ENERGY SITING (NEW LANGUAGE)

SECTION 1: This Act shall be entitled the “Wind Energy Siting Reform Act”, and shall be construed in a manner to achieve its public purposes, which are to encourage the development of clean, renewable, electric generating plants and ancillary facilities powered by wind, ensure that such facilities are sited in appropriate locations based on clear, predictable, and environmentally protective standards, and streamline the permitting of such facilities at the state and local level and reduce delays associated with appeals of such permits.

SECTION 2. Section 10 of chapter 25A of the General Laws, as amended by section 22 of chapter 169 of the Acts of 2008, is hereby amended by adding the following subsection:-

(g) There shall be within the department a full-time employee who shall work with the division to provide technical assistance to municipalities with respect to the siting of wind energy facilities.

SECTION 3. Section 69H of chapter 164 of the General Laws, as appearing in the 2007 Official Edition, is hereby amended by inserting after the words “2 commissioners of the commonwealth utilities commission” the following words:- the commissioner of the department of fish and game,

SECTION 4. Said section 69H of said chapter 164, as so appearing, is hereby further amended by striking out the words “3 public members” and inserting in place thereof the following:- 4 public members,

SECTION 5. Said section 69H of said chapter 164, as so appearing, is hereby further amended by inserting after the words “energy issues” the following:- , one of whom shall be a municipal official with experience in land use planning,

SECTION 6. Chapter 164 of the General Laws, as so appearing, is hereby amended by adding after section 69S the following three new sections:-

Section 69T. The Department of Public Utilities shall establish a division of wind energy facility siting, with adequate staff, and appoint a director of that division who shall be responsible for ensuring that the siting standards established in section 69U of this chapter are timely issued, and that the procedures for the siting of wind energy facilities established in section 69V result in timely and predictable permitting decisions.

Section 69U. No later than six months after the effective date of this act, the board shall promulgate regulations containing standards for the siting, operation, and decommissioning of electric generating plants and ancillary facilities thereto that are: (1) powered by wind energy and (b) have the capacity to generate two or more megawatts of electricity. The criteria shall be established for wind energy facilities that are sited on land. Facilities are not required to comply with such standards, but compliant facilities shall be entitled to state agency fast-track permitting pursuant to section 69V of this chapter and municipal fast-track permitting pursuant to chapter 40T. The siting of offshore wind facilities shall be governed by the integrated ocean management plan established pursuant to section 4C of chapter 21A.

The standards for wind energy facilities sited on land shall include, but not be limited to, the following:: lighting; appropriate setbacks from residential neighborhoods to minimize sound and health and safety impacts; performance standards to avoid impacts, and to the extent impacts cannot be avoided, to minimize and mitigate impacts to scenic or recreational areas of special federal or state significance, priority or estimated habitats for plant and animal species listed pursuant to chapter 131A, populations of bird and bat species that are considered by the department of fish and game as being vulnerable to impacts

from the operation of wind turbines, large unfragmented habitat blocks , wetland resources or other ecologically sensitive areas subject to protection under federal or state law and/or as identified by the department of environmental protection, department of conservation and recreation, or the department of fish and game; additional protections for lands subject to Article XLIX, as appearing in Article XCVII, of the Amendments to the Constitution of the Commonwealth (Article 97) that are found to be suitable for wind energy generation pursuant to a planning process conducted by the executive office of energy and environmental affairs, and such other factors as the board determines to be relevant to foster the development of wind energy in a manner that avoids, minimizes and mitigates material adverse environmental impact. Mitigation may include, but is not limited to, the preservation, enhancement, restoration or establishment of resources of equal ecological value to those being impacted, as compensation for unavoidable environmental impacts. The standards may vary from region to region to take into account material differences in the natural resources, available wind resources, or other characteristics of regions, provided that all applicable standards shall be as protective as existing state environmental statutes and regulations. The standards shall be based upon best available science, be drafted in consultation with the relevant agencies and the advisory group described below, and shall be reviewed and updated as necessary, but not less than once every five years.

The board shall empanel an advisory group to assist in developing the standards. The advisory group shall include the secretary of energy and environmental affairs, the commissioner of the department of energy resources, a commissioner of the department of public utilities, the commissioner of the department of environmental protection, the commissioner of the department of conservation and recreation, the commissioner of the department of fish and game, the commissioner of the department of public safety, the secretary of the executive office of housing and economic development, or the designees of any of the foregoing from their respective staffs. The advisory group shall also include the following individuals to be selected by the secretary of the executive office of energy and environmental affairs: a representative of the wind energy industry, a representative of the electric transmission and distribution industry, two representatives from non-profit environmental organizations with experience in wind energy facility siting policy, of whom one shall represent a land and water conservation organization, a representative of the Berkshire Regional Planning Council, a representative from the Cape Cod Commission, a municipal official with experience in wind energy facility siting drawn from a list of not fewer than three candidates prepared by the massachusetts municipal association, and up to three other representatives as the secretary deems advisable.

Section 69V.

(a)Notwithstanding any general or special law to the contrary, any person who proposes to construct a wind energy facility with a capacity of two or more megawatts may elect to follow the procedures established by this section and sections 69T and 69U of this chapter. As used in this section, the term “wind energy facility” or “the facility” includes blades, turbines, towers, supports, foundations, and any ancillary facilities such as roadways, transmission or distribution lines, substations, and any other buildings, structures or equipment whose primary purpose is to support the generation and delivery of electricity powered by wind.

(b)A proposal to develop a wind energy facility that complies with the siting standards established pursuant to section 69U shall be eligible for the fast-track permitting procedures set forth in this section and section 3 of chapter 40T.

(c)After a municipal wind energy board or planning board authorized under section 1 or 2 of chapter 40T renders a final decision, or constructive approval results pursuant to section 3(f) of chapter 40T, the project applicant may file an application with the board, together with such supporting materials as are necessary to demonstrate that the facility complies with the siting standards. The application shall include, in such form and detail as the board shall from time to time prescribe, the following information: (i) a description of the proposed wind energy generating facility, including any ancillary structures and related facilities; (ii) a description of the project's environmental impacts, both positive and negative, (iii) a statement of whether the project complies with the siting standards established under section 69U, and if it does not, a listing of the standards for which the project does not comply and an explanation as to why compliance is not practicable; (iv) a complete list of state agency permits that would otherwise be needed for the facility; (v) any other information requested by the board. The applicant shall simultaneously file a notice of the application with the municipal wind energy permitting board or planning board established pursuant to chapter 40T, any state agencies that have been identified as permit granting authorities in the application, abutters to the site of the facility, and the office of the Massachusetts Environmental Policy Act, which shall publish the notice in the Environmental Monitor. Within thirty days of receipt of the application, board staff shall inform the applicant in writing whether the application is complete. The applicant shall make the full application readily available to all relevant agencies and municipalities, and the board shall establish a procedure to ensure that the application and supporting materials are available electronically.

(d)Within two months of the issuance of a determination that the application is complete, a hearing officer of the siting board shall take written public comment and hold a non-adjudicatory public hearing to take oral comment on the application. The hearing officer shall allow not less than 45 days from the determination of a complete application for public comments to be submitted. Based on the comments that are submitted, if the hearing officer determines that there are genuine disputes of material fact, the hearing officer shall schedule one or more evidentiary hearings for the limited purpose of taking further evidence upon the issues for which there is a genuine dispute of material fact. In any instance in which there is a factual dispute between the applicant and a state agency regarding matters within the state agency's regulatory authority, an evidentiary hearing shall be held as to that dispute at the request of the applicant or the state agency. Evidence may be presented at such hearing by the applicant, the municipality in which the proposed facility is located, and state permit granting authorities, and by any entity or person from the following list, provided such entity or person submitted comments during the initial public comment period: an abutter, a person who is substantially and specifically affected by the proceeding, or any group consisting of not fewer than ten residents of the municipality in which the facility is proposed. The evidentiary hearing shall be completed no later than 3 months following the close of the initial public comment period. The evidentiary hearing shall include written or oral testimony under oath, the opportunity for cross-examination, and the compilation of a record of admissible evidence, but the hearing officer and the board shall not be bound by the provisions of paragraph 7 of section 11 of chapter 30A.

(e) State permit granting agencies shall file comments with the hearing officer during the initial two month public comment period. The comments shall assist the board in determining whether the siting standards have been met, and shall include recommended conditions within each agency's regulatory purview.

(f)Within two months of the close of the public hearing or evidentiary hearings if scheduled, the board shall render a written decision on whether the facility meets the siting standards. Notwithstanding the provisions of any other law to the contrary, if the board finds that the facility meets the siting standards, it shall approve the facility, and may impose conditions to its approval. Conditions recommended by state environmental agencies with respect to issues within their permitting authority under state law, and/or

conditions recommended by host municipalities or their constituent boards, shall be adopted to the maximum extent practicable, and the board shall explain the reasons for not including any such conditions in its written decision.

(g)Should the board find that the facility does not meet the siting standards, it may hold additional hearings to take additional evidence from both the applicant and interested parties, if necessary, and, notwithstanding the provisions of any other law to the contrary, approve the facility and impose conditions to its approval if it finds that the facility has complied to the maximum practicable extent with the siting standards established under section 69U, that the facility has mitigated the impact arising out of the non-compliance with the siting standards, and the benefits of the facility outweigh the detriments, taking into account benefits including but not limited to the avoidance or reduction of greenhouse gases and other pollutants, energy reliability, security and diversification, and detriments including but not limited to the impact on ecologically sensitive areas, large unfragmented habitat blocks, priority or estimated habitats for plant and animal species listed pursuant to chapter 131A, populations of bird and bat species that are considered by the department of fish and game as being vulnerable to impacts from the operation of wind turbines, scenic or recreational areas of special federal or state significance, noise and public safety. A decision under this subparagraph shall be issued no later than nine months after the written determination of a complete application, if no evidentiary hearings are held, or within twelve months if evidentiary hearings are held. Conditions recommended by state environmental agencies with respect to issues within their permitting authority under state law, and/or conditions recommended by host municipalities or their constituent boards, shall be adopted to the maximum extent practicable, and the board shall explain the reasons for not including any such conditions in its written decision.

(h)Notwithstanding the provisions of any other law to the contrary, if the board issues an approval under this section, no state agency or local government shall require any approval, consent, permit, certificate or condition for the construction, operation or maintenance of the facility with respect to which the approval is issued and no state agency or local government shall impose or enforce any law, ordinance, by-law, rule or regulation nor take any action nor fail to take any action which would delay or prevent the construction, operation or maintenance of such facility; provided, however, that the board shall not issue an approval the effect of which would be to grant or modify a permit, approval or authorization which, if so granted or modified by the appropriate state or local agency, would be invalid because of a conflict with applicable federal water, air or threatened and endangered species standards or requirements. The approval, if issued, shall be in the form of a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility and that portion of the approval which relates to subject matters within the jurisdiction of a state or local agency shall be enforced by said agency under the other applicable laws of the commonwealth as if it had been directly granted by the said agency. Notwithstanding the foregoing, section 69V shall not be deemed to exempt wind energy facilities from sections 61, and 62A through 62I of chapter 30.

(i)Notwithstanding subsection (h), if the municipal wind energy permitting board or planning board grants a permit pursuant to chapter 40T, the board's decision shall not supersede the municipal permit except as to any locally-imposed conditions that the board finds would significantly impair the ability of the applicant to develop, construct, own, or operate the facility, but the board may impose conditions that are more environmentally protective than those imposed by the municipality. Notwithstanding subsection (h), if the municipal wind energy permitting board or planning board denies a permit pursuant to section 40T, the board's decision shall not be deemed to override the municipal denial unless the board finds that the facility meets all of the siting standards established under section 69U, but in that instance the applicant shall have the right to appeal the decision of the municipal wind energy permitting board or planning board to superior court or land court under the provisions of section 17 of chapter 40A.

(j)The board shall combine the review and approval process under this section with any appeal of a local wind energy permitting board decision or constructive approval brought by an applicant or aggrieved person pursuant to chapter 40T.

(k)An application filed by a person proposing to construct a wind energy facility that does not comply with the siting standards shall be governed by the same procedures as above, except that: (a) the hearing officer shall hold a public hearing and close the public comment period within four months from the date of determination of a complete application; (b) the hearing officer shall hold evidentiary hearings as needed to resolve genuine disputes of material facts within eight month from the date of determination of a complete application; and (c) the board shall issue a decision within 4 months of the close of the public comment period or evidentiary hearing. The board shall issue an approval if it finds that the facility meets the standards set forth in subsection (g) of this section. Conditions recommended by state environmental agencies with respect to issues within their permitting authority under state law, and/or conditions recommended by host municipalities or their constituent boards, shall be adopted to the maximum extent practicable, and the board shall explain the reasons for not including any such conditions in its written decision.

(l) No later than 6 months after the effective date of this act, the board shall promulgate regulations governing the procedures for permitting under this section and appeals brought pursuant to chapter 40T. The regulations shall include clear and concise application requirements, including but not limited to pre-application survey requirements developed by the board in consultation with the department of fish and game and the department of environmental protection, and may provide for pre-application consultation and site visits. Sufficient data shall be required from the applicant by these regulations to enable the board to determine whether the facility meets the siting standards under section 69U, and if it does not, whether it meets the standards set forth in subsection (g), provided, however, that these regulations shall not require any data related to the necessity or cost of the proposed generating facility, except for data related to the costs associated with the mitigation, control, or reduction of the environmental impacts of the proposed generating facility.

(m) The regulations shall also provide for a reasonable application fee for wind energy facilities subject to this section to defray the board's reasonable costs of processing the application; a fee set under such regulations may be adjusted according to project size or other objective criteria. The regulations shall also ensure that a reasonable portion of the fee charged under this section shall be allocated to state agencies that would otherwise be issuing permits for the facility in accordance with a fee schedule to be adopted concurrently with the regulations. The board may retain said fees for the purpose of reviewing applications to construct wind energy facilities. Any remaining balances of said fees at the end of a fiscal year shall not revert to the General Fund, but instead shall be available to the board during the following fiscal year for the purposes provided herein. Nothing in this section shall change the level or use of siting fees for any other type of facility subject to section 69J ½ of this chapter.

(n) Any party in interest aggrieved by a decision of the board under this section shall have a right to judicial review in the manner provided by section 5 of chapter 25. The scope of such judicial review shall be limited to whether the decision of the board is in conformity with the constitution of the commonwealth and the constitution of the United States, was made in accordance with the procedures established under sections 69U and 69V, and with the rules and regulations of the board with respect to such provisions, was supported by substantial evidence in the record of the board's proceedings; and was arbitrary, capricious or an abuse of the board's discretion.

Section 69W: Sections 69U and 69V shall not preclude, or obligate an applicant for a “facility” as defined in section 69G of this chapter from seeking and obtaining board approvals and certificates pursuant to sections 69K through 69O ½ in lieu of proceeding under sections 69U and 69V.

SECTION 7. The General Laws are hereby amended by adding after Chapter 40S, as so appearing in the 2006 Official Edition, the following new chapter:-

Chapter 40T: Wind Energy Permitting .

Section 1. A municipality with significant wind resource areas as determined by the department of energy resources, in consultation with the massachusetts municipal association, shall establish a wind energy permitting board to conduct local permitting of a wind energy facility. As used in this chapter, the term “wind energy facility” or “the facility” includes blades, turbines, towers, supports, foundations and any ancillary facilities such as roadways, transmission or distribution lines, substations, and any other buildings, structures or equipment whose primary purpose is to support the generation and delivery of electricity powered by wind. In all other municipalities, the municipality’s planning board shall implement the provisions of this chapter.

Section 2. In the case of towns, the board of selectmen, and in the case of cities, the mayor, shall establish and appoint the wind energy permitting board, to be composed of either three or five members, at the discretion of the board of selectmen or mayor. A three member board shall consist of one representative from the conservation commission, one member from the zoning board of appeals, and one member from the planning board. A five member board shall consist of two members of the conservation commission, one member from the zoning board of appeals, and two members from the planning board. If the board of selectmen or mayor determine that it is infeasible to establish a wind energy permitting board, the planning board shall serve as the wind energy permitting board to implement the provisions of this chapter. In such instances, the planning board shall take actions to maximize the opportunity for input from other municipal boards, and shall at a minimum ensure that the conservation commission and zoning board of appeals are provided with copies of the application and notices of any public hearings. As used hereafter, the term “wind energy permitting board” shall also mean the planning board acting under sections 1 and 2 of this chapter.

Section 3.

(a) Any person who proposes to construct a wind energy facility with a capacity of two or more megawatts may elect to follow the procedure established by this chapter.

(b) A proposal to develop a wind energy facility that complies with the siting standards established pursuant to section 69U of chapter 164 shall be eligible for the fast-track permitting set forth in this section and section 69V of chapter 164.

(c) The project proponent shall file an application with the wind energy permitting board and the town or city clerk in lieu of separate applications to the otherwise applicable local boards, commissions, officials or other municipal agencies or authorities (hereinafter referred to collectively as “local boards”). The application shall identify any provisions of local laws or regulations from which a waiver is sought. Within thirty days of receipt, the chairman of the wind energy permitting board, or his designee, shall inform the proponent whether the application is complete. If the application is incomplete, the proponent

shall provide the additional information within thirty days or such longer time as may be mutually agreed upon. After the expiration of this period, the proponent may elect to go forward with the information provided, and the procedures and timelines set forth below shall apply.

(d)The wind energy permitting board shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations and shall, within sixty days of the determination of a complete application or the expiration of the additional information period described in subsection (c), and in compliance with the notice and publication provisions of section 11 of chapter 40A, hold a public hearing and a written public comment period of not less than 45 days on the application. The wind energy permitting board shall request the recommendations of said local boards as are deemed necessary or helpful in making its decision upon such application and shall have the same power to issue a permit or other approval as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions as are consistent with the terms of this section and otherwise authorized by applicable local laws and regulations.

(e)The wind energy permitting board, in making its decision on the application, shall take into consideration the recommendations of the local boards and shall have the authority to assess fees to retain consultants pursuant to the provisions of section 53G of chapter 44. The board shall have the authority to waive zoning and non-zoning requirements of the municipality's local laws, regulations, policies, or other regulatory requirements.

(f)The board shall file with the city or town clerk a written decision, based upon a majority vote of said board, within 120 days from the filing of the application, unless the time period is extended by mutual agreement by the board and the applicant, and the agreement is filed with the city or town clerk prior to the expiration of the 120 day period. Failure to file a written decision or extension within the 120 day period shall result in a constructive approval of the application.

(g)A wind energy facility that does not comply with the siting standards established under section 69U of chapter 164 shall be governed by the same procedures as set forth in subsections (a) through (f) above, except that the deadline for a decision shall be 180 days, rather than 120 days.

(h)The wind energy permitting board is authorized to assess an impact fee upon the applicant in accordance with a fee schedule to be promulgated by the department of energy resources. Notwithstanding the foregoing, the wind energy permitting board may accept other forms of mitigation in lieu thereof, including but not limited to a purchase and sale agreement for electricity between the municipality and the applicant, and is authorized to enter into a legally enforceable agreements with the applicant for such other mitigation.

(i)Notwithstanding any general or special law to the contrary, a municipality in which the wind energy permitting board has issued an approval pursuant to this chapter shall be deemed to have met the green community eligibility standards set forth in subsections (2) and (3) of section 10(c) of chapter 25A, and if the municipality seeks a waiver of any of the other eligibility requirements, shall be entitled to a finding that the municipality has committed to alternative measures that advance the purposes of the green communities program as effectively as adherence to the requirements.

(j) If a project proponent proposes a single wind energy facility in more than one municipality, the wind energy permitting boards, or planning boards, if applicable, may hold joint hearings in one or more municipalities.

(k) Notwithstanding any general or special law to the contrary, the wind energy permitting board shall not be required to await a decision by a regional agency prior to acting upon an application under this section, and the timelines for action under this section shall not be extended due to such regional agency action.

(l) Any person aggrieved by a decision of the wind energy permitting board or a regional planning agency may appeal the decision to the energy facilities siting board and this appeal shall be the exclusive means of review of the decision of the wind energy permitting board or a regional planning agency, except as set forth herein. The appeal shall be filed with the siting board no later than thirty days after the wind energy permitting board's decision is filed with the city or town clerk or rendered by a regional planning agency, and shall be governed by section 69V of chapter 164 and regulations promulgated thereunder. Notwithstanding the foregoing, the energy facilities siting board shall not have jurisdiction over appeals of decisions of any regional planning agency that has, prior to the date of an application under this chapter, established comprehensive wind energy siting standards that have been approved in writing by the department of energy resources; such appeals shall instead be taken as provided pursuant to the general or special law governing the regional planning agency. Notwithstanding the foregoing, if the wind energy permitting board denies a permit under subsection (g), the applicant may, at its election, file an appeal in superior court or land court, in lieu of filing an appeal with the energy facilities siting board, and the procedures set forth in section 17 of chapter 40A shall govern that appeal. If the wind energy permitting board denies a permit under subsection (b), and the energy facilities siting board finds that the facility does not meet the siting standards under section 69U of chapter 164, the applicant may appeal the municipal wind energy permitting board's decision to superior court or land court within thirty days of the issuance of the siting board decision, and the procedures set forth in section 17 of chapter 40A shall govern that appeal.

Section 8: Section 3 of chapter 40A, as so appearing in the 2006 Official Edition, is hereby amended by inserting after the words "public service corporation" on lines 46 and 53 the following:

"or by any person or entity to generate and transmit electricity derived from wind"

Section 9: Section 7: Section 3 of chapter 40A, as so appearing in the 2006 Official Edition, is hereby amended by inserting after the words "the corporation" on lines 56 following:

"or of any person or entity to generate and transmit electricity derived from wind"

Section 10: The executive office of energy and environmental affairs, in consultation with the department of conservation and recreation, department of fish and game, and the department of energy resources, shall undertake a planning process to identify state lands protected under Article XLIX, as appearing in Article XCVII, of the Amendments to the Constitution of the Commonwealth (Article 97) that are both suitable and unsuitable for wind power generation. Locations identified as unsuitable for wind power generation shall not be used for that purpose. The plan shall be completed prior to any change of use or disposition of Article 97 lands for wind power generation. The executive office shall issue the plan within one year of the effective date of this act; the plan may be revised from time to time in accordance with the requirements of this section. Change of use or transfer of such lands shall require a detailed analysis of project alternatives and mitigation for loss of acreage and of any ecological, recreational and scenic resources.

